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IN THE
COURT OF APPEALS OF INDIANA

DAVID D. BARANY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A03-0607-CR-286
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Kurt Carpenter, Judge
Cause No. 17C01-0505-MR-1

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

David D. Barany appeals his conviction for murder.[1] Barany raises three issues on appeal, which we revise and restate as:

I. Whether the trial court abused its discretion by denying Barany's motion for mistrial;

II. Whether the trial court erred by denying Barany's objection to the admission of testimony regarding the relevancy of Hardenbrook's sofa; and

III. Whether Barany was denied due process when the State failed to preserve certain evidence.

We affirm.

The relevant facts follow. On May 27, 2005, Barany went to the apartment of John Hardenbrook to collect a debt. Approximately forty-five minutes after Barany's arrival, Hardenbrook's neighbors in the adjoining apartment heard a scuffle followed by two loud noises coming from inside Hardenbrook's apartment. Initially, the neighbors thought the noises were makeshift firecrackers exploding because Hardenbrook was known to sometimes set firecrackers off. Shortly thereafter, Barany left the scene. Approximately twenty minutes later, another neighbor told Hardenbrook's adjoining neighbors that something was wrong with Hardenbrook. The adjoining neighbor entered Hardenbrook's apartment and found him dead.

The police arrived at Hardenbrook's residence approximately two minutes after receiving the 911 call. Upon the officers' arrival at the scene, neighbors informed them of Hardenbrook's prior use of homemade explosives. Therefore, police initially thought

[1] Ind. Code § 35-42-1-1(1) (2004).

Hardenbrook's death may have been accidental. Before moving anything, officers secured the crime scene and photographed Hardenbrook lying on his couch. Upon moving Hardenbrook's body, police discovered that he had been shot, which was determined to be the cause of death.

On May 31, 2005, the State charged Barany with murder. At trial, Barany testified that he shot Hardenbrook in self-defense. Barany told the jury that Hardenbrook had spit in his face, causing Barany to hit him. Further, Barany testified that Hardenbrook, who had hepatitis, stabbed him with a hypodermic needle, and, when Barany told Hardenbrook that he was going to the police, Hardenbrook threatened to kill him while allegedly reaching for a weapon. During the trial, Barany made an oral motion for mistrial based on the fact that a jury request was made to review transcripts and videotapes of police interviews with Barany. The trial court denied the motion. A jury found Barany guilty as charged, and the trial court sentenced him to fifty years with forty-five years executed in the Indiana Department of Correction and five years suspended.

I.

The first issue is whether the trial court abused its discretion by denying Barany's motion for mistrial. Barany argues that the trial court should have granted his motion for mistrial because "at least one juror, contrary to the specific, repeated instructions of the court, had begun deliberating." Appellant's Brief at 12. Barany based his motion on the fact that, following the State's case in chief, a juror gave a note to the bailiff requesting to view the transcripts and videotapes of police interviews with Barany again.

"A mistrial is an extreme remedy that should be invoked only when no other measure can rectify the situation." Williams v. State, 755 N.E.2d 1128, 1132 (Ind. Ct. App. 2001) (citing Flowers v. State, 738 N.E.2d 1051, 1058 (Ind. 2000), reh'g denied), trans. denied. "The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court." Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001) (citing Ortiz v. State, 741 N.E.2d 1203, 1205 (Ind. 2001)). "The trial court's determination will be reversed only where an abuse of discretion can be established." Id. (citing Wright v. State, 593 N.E.2d 1192, 1196 (Ind. 1992), cert. denied). "To prevail, the appellant must establish that he was placed in a position of grave peril to which he should not have been subjected." Id. (citing Mickens v. State, 742 N.E.2d 927, 929 (Ind. 2001)). "We determine the gravity of the peril by considering the misconduct's probable persuasive effect on the jury's decision, not the impropriety of the conduct." Williams, 755 N.E.2d at 1132 (citing Mickens, 742 N.E.2d at 929).

Here, Barany has failed to show that the jury's request to view the evidence again placed him in a position of grave peril to which he should not have been subjected. Barany asserts that such a request indicates that deliberation had begun, and, as such, closed the juror's mind to any defense. As Barany concedes in his brief, there is no support for this argument in Indiana case law. With regard to jury instructions, Indiana law provides:

> The court shall admonish jurors in the preliminary instruction, before separating for meals, and at the end of the day, that it is their duty not to converse among themselves or permit others to converse with them on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them.

Ind. Code § 35-37-2-4 (2004). "The rationale behind prohibiting jurors from conversing is to insure that they maintain open minds." Whitley v. State, 439 N.E.2d 715, 718 (Ind. Ct. App. 1982). However, Ind. Jury Rule 20(a)(8) provides:

> The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:
>
> * * * * *
>
> (8) that jurors are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.
>
> * * * * *

Barany provides no support for his argument that the juror's request necessarily indicates that the juror had made up his mind regarding Barany's guilt or innocence. Barany has shown no evidence that he was subjected to grave peril by the juror's request.[2]

Moreover, upon Barany's objection, the trial court determined that a mistrial was unwarranted and took immediate corrective action. Relevant portions of the exchange provided:

> Defense: Finally, Your Honor, based upon communication to the Court by the Jury, [Barany] moves the Court for a mistrial, uh, based upon the information handwritten from a member of

[2] Barany concedes in his brief that the tapes were not re-played to the jury, nor does it appear that the exhibits were sent to the jury room at that time.

> the Jury, requesting review of, re-review of certain evidence before it, introduced during the State's, State's case in chief, demonstrates that the Jury, or at least this member of the Jury, has begun deliberation and have ignored the Court's repeated admonishments to presume [Barany] innocent to allow [Barany] to put on evidence. . . .
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> * * * * *
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> The Court:
>
> > Good morning, ladies and gentlemen, and welcome back. I want, I have a, uh, a short admonition I want to give you this morning, based on, uh, occurrences that, things have occurred. Now, it is not the time to reach any conclusions or verdicts about this case, or to try to focus in [sic] any piece or pieces of evidence. It is very important that each Juror continue to have an open mind. There is still evidence to come before this trial. There are the arguments of counsel and the Instructions of the Court. To do otherwise would be totally improper.

Transcript at 940, 945-946. "A proper admonishment to the jury is presumed to cure any alleged error, unless the contrary is shown." Hackney v. State, 649 N.E.2d 690, 694 (Ind. Ct. App. 1995), trans. denied. Here, the trial court's admonishment presumptively cured any error. Therefore, we find no abuse of discretion. See, e.g., Whitley, 439 N.E.2d at 718 (holding that the trial court did not abuse its discretion where its admonition to the jury presumptively cured any error).

II.

The next issue is whether the trial court erred by denying Barany's objection to the admission of the testimony of Detective Robbins regarding the relevancy of

Hardenbrook's sofa.[3] In the relevant exchange between the State and Detective Robbins, the testimony provides in relevant part:

* * * * *

State: With regard to the sofa, hindsight is twenty (20) twenty (20). Is there really anything relevant about that sofa today?

Defense: Well, excuse me. Excuse me. I'm going to object to that. I suppose that's a question left for the Jury to determine rather than this Officer. It's gone, never to be back. I object to the question as first of all leading and irrelevant.

Court: It's not leading. Clearly it's relevant. If it's something the Jury wants to determine. It's a, that would make it relevant, uh, uh, so, so it's relevant but I think the real crux of your issue is is it a proper question to this particular witness. Does it invade the provenance [sic] of the Jury? Isn't that what you're saying?

Defense: I believe it does, yes, Your Honor. They will ultimately have to determine whether it was relevant or not.

Court: But he's been, he's been, uh, qualified as a Crime Scene Investigator and both of you have asked his opinion on several issues concerning crime scene investigation and his, and his opinion on this issue, uh, using twenty (20) twenty (20) hindsight, I don't see as any less relevant or any less admissible.

Defense: I agree. Thank you.

Transcript at 683-84. In the exchange, Barany indicated that the State's inquiry regarding the relevance of the sofa invaded the province of the jury.[4]

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[3] The sofa had not been preserved by the State and Detective Robbins testified that there was nothing relevant about the sofa.

[4] Barany argues that "by calling [Detective Robbins] an 'expert' the court essentially vouched for his credibility." Appellant's Brief at 20. However, even though the trial court in essence referred to Detective Robbins as an expert by stating that "he's been, uh, qualified as a Crime Scene Investigator,"

We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), reh'g denied, trans. denied.

Here, despite the fact that Barany initially objected to the testimony regarding the relevancy of the sofa, he later agreed with the trial court that the testimony was not "any less relevant or any less admissible" than the previous opinion testimony solicited by both Barany and the State from Detective Robbins. Transcript at 683-84. The relevant exchange between Barany and the trial court provided:

> Court: But he's been, he's been, uh, qualified as a Crime Scene Investigator and both of you have asked his opinion on several issues concerning crime scene investigation and his, and his opinion on this issue, uh, using twenty (20) twenty (20) hindsight, I don't see as any less relevant or any less admissible.
>
> Defense: I agree. Thank you.

Id. Barany's agreement with the trial court had the effect of withdrawing Barany's objection to the testimony.

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any improper characterization would have to be analyzed under the trial court's obligation to be fair and impartial. Transcript at 683-84. However, the trial court's reference here relates to its judgment of the admissibility of the 'expert' witness's opinions as to relevance and not to any vouching for the witness.

Furthermore, the State again asked Detective Robbins whether there was "anything relevant about collecting [Hardenbrook's] couch." Id. Barany did not object to the question. Therefore, the issue, not having been preserved for appeal, is waived. See, e.g., Small v. State, 736 N.E.2d 742, 748 (Ind. 2000) (holding that "no error is preserved for appeal where there was no objection interposed at the time of the action complained of").

Therefore, we conclude that the trial court did not abuse its discretion by admitting the testimony.

III.

The next issue is whether Barany was denied due process when the State failed to preserve certain evidence. Barany contends that he was denied due process when the State failed to preserve certain evidence. Specifically, Barany argues that if the police had left Hardenbrook's body where it was found, preserved the couch on which the body was discovered, and tested some of Hardenbrook's hypodermic needles, Barany's self-defense claim would have been successful.

"The defendant in a criminal case has the right to examine physical evidence in the hands of the State." Roberson v. State, 766 N.E.2d 1185, 1187 (Ind. Ct. App. 2002) (internal citations omitted), reh'g denied, trans. denied. "The failure of the State to preserve such evidence may present grounds for reversal based on denial of due process of law." Id. This court has held:

> [t]o determine whether a defendant's due process rights have been violated by the state's failure to preserve evidence, we must first decide whether the evidence in question was "potentially useful evidence" or "materially

> exculpatory evidence." Potentially useful evidence is defined as evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. The State's failure to preserve potentially useful evidence does not constitute a denial of due process of law unless a criminal defendant can show bad faith on the part of the police. Bad faith is defined as being not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity.
>
> On the other hand, materially exculpatory evidence is that evidence which possesses an exculpatory value that was apparent before the evidence was destroyed and must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Exculpatory is defined as clearing or tending to clear from alleged fault or guilt; excusing. The scope of the State's duty to preserve exculpatory evidence is limited to evidence that might be expected to play a significant role in the suspect's defense. Unlike potentially useful evidence, the State's good or bad faith in failing to preserve materially exculpatory evidence is irrelevant.

Land v. State, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004) (internal citations omitted), trans. denied.

Barany argues that the police improperly handled certain evidence. Specifically, Barany states that "the position of Hardenbrook's body and the distance between Barany and Hardenbrook at the time of the shooting would have been helpful." Appellant's Brief at 22. Additionally, Barany argues that had the couch on which Hardenbrook was found been preserved and the hypodermic syringes tested, he would have been vindicated in his claim of self-defense. Barany argues that, despite the fact that he claimed justification for Hardenbrook's death, "the police ignored or refused to collect any evidence which would have supported Barany's story." Id. at 24. Instead, according to Barany, "the police collected only information which supported [the

detectives'] theory of the case." Id. Barany argues that this behavior showed bad faith of police.

The evidence at issue more closely fits the definition of potentially useful evidence rather than materially exculpatory evidence. Where the evidence is only potentially useful, the defendant must establish bad faith on the part of the State. Roberson, 766 N.E.2d at 1188. As stated above, "bad faith is defined as being not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." Land, 802 N.E.2d at 49. Barany has failed to establish that the police acted in bad faith in their handling of the evidence here. Upon their arrival at Hardenbrook's apartment, police secured the scene, took statements from witnesses, and photographed the scene. The statements given by witnesses regarding Hardenbrook's hobby of making homemade explosives guided the detective's initial theory of accidental death. Only upon further investigation, including moving the body, did police determine that Hardenbrook had been shot. With regard to the sofa, Detective Robbins testified that there was no need to keep the sofa. He testified that the sofa was too big to package. However, the determining factor in not keeping the sofa as evidence was the fact that the police had cut a fabric swatch out of it, photographed it, and obtained what they needed for processing. With regard to the syringe, the Detective Robbins's testimony indicated that it is against lab policy to fingerprint syringes due to their dangerous nature. Instead, syringes found at crime scenes are disposed of.

We find no evidence to support Barany's argument that the police exhibited bad faith by their conduct. Instead, it appears that the police were following established

department protocol. Therefore, we find that Barany's due process rights were not violated. See, e.g., Chissell v. State, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), trans. denied. (holding that the defendant was not denied due process where the evidence was not materially exculpatory and the defendant failed to demonstrate bad faith on the part of the police); Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (holding that failure to preserve blood samples for defendant to test did not constitute denial of due process where there was no showing of bad faith); Vaughn v. State, 559 N.E.2d 610 (Ind. 1990) (holding that failure to preserve notebook which defendant alleged may have contained exculpatory evidence was not reversible error where no showing of bad faith); Everroad v. State, 570 N.E.2d 38 (Ind. Ct. App. 1991), aff'd in part, vacated in part on other grounds, (holding that failure to establish bad faith resulted in no error when police failed to test seized contraband for fingerprints).

For the foregoing reasons, we affirm Barany's conviction for murder.

Affirmed.

SULLIVAN, J. and CRONE, J. concur